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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S.G. FRANTZ CO., INC.,
Petitioner,

vs.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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ARGUMENT

This reply is submitted to correct misstatements of fact and law in respondent's brief in opposition to the petition (hereinafter "Rbo").

1. Respondent misstates the trial court's disposition of issues as to multiple taxation of the sales at issue, saying that the court

> "*** permitted [petitioner] the opportunity to submit proofs at a trial in support of its allegations that the imposition of the New Jersey tax upon the repairing services resulted in multiple tax burdens upon that same transaction." (Rbo at 9.)

The trial court in fact precluded submission by petitioner of proofs as to the issues of the multiple tax burdens imposed on the purchasers in other states whom New Jersey subjected to its retail sale tax. It held that

> "*** imposition of a use tax by another state upon the same transaction does not result in multiple taxation in derogation of the fair apportionment test." *Airwork Service Division v. Director, Division of Taxation*, 2 N.J. Tax 329 (1981) (opinion incorporated by reference in its letter opinion herein) at 350.

The issues as to which the trial court's decision allowed proofs were expressly restricted to whether or not

> "*** the states of destination *** impose sales, as distinguished from use taxes, on the purchases of [petitioner's] services ***." *Id.* at 351.

and whether or not

> "*** those states — or some of them — might impose a sales tax on the repair parts used by [petitioner] in its work ***." *Id.* at 351.

The purchasers in these transactions were liable for use taxes under the laws of each of the market states, measured by the price paid for the repairs, except where the law specifically exempted the intended use. Use taxes, not retail sales taxes, were imposed under the laws of the market states because petitioner, having no place of business in any of those states, did not transact the sales there and was not a vendor subject to sales tax collection duties under their laws.

This Court pointed out that retail sales taxes and use taxes are alike in form and substance in *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940). In that case the Court sustained the New York City retail sales tax as one laid on consumers within the state which had "**** no different effect upon interstate commerce than a tax upon the 'use' of property which has just been moved in interstate commerce". *Id.* at 49. The decision of this Court in *Berwind-White*, following its decision in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) sustaining the constitutionality of the Washington "compensating tax" on the privilege of use of personal property within the state, formed the basis of the national system of sales and use taxation. Retail sales and use taxes are, as the report of a special subcommittee of the House Committee on the Judiciary states,

> "**** two components of a single system. The intention is to tax all consumption or use within a State of specified goods and services in such a manner that the amount of tax is unaffected by where the goods were purchased. Although two taxes exist, it is not intended that a particular consumption or use will be taxed under both." STATE TAXATION OF INTERSTATE COMMERCE, H.R. Rep. No. 565, 89th Cong., 1st Sess. (1965), Vol. 3, Part III, at p. 823. (The report is commonly known as the "Willis Committee Report".)

The cases decided by this Court, *International Harvester v. Treasury Dep't*, 322 U.S. 340 (1944) and *Treasury Dep't v. Wood Preserving Corp.*, 313 U.S. 62 (1941), which the trial court cited in support of its holding that "imposition of a use tax by another state upon the same transaction does not result in multiple taxation" do not, of course, support that holding. They upheld imposition of gross receipts taxes on vendors when purchasers from other states came into the state of the vendor to take delivery of the goods. *Utah Tax Comm'n v. Pacific Pipe Co.*, 372 U.S. 605 (1963) upheld imposition of a retail sales tax on a purchaser from another state who entered the vendor's state to pick up the goods.[1]

2. Respondent, to support his construction of the New Jersey statute as imposing the retail sales tax on the performance by petitioner of repairs within the state, quotes the statutory definition of "Sale, selling or purchase", emphasizing the words "*including the rendering of any service*", and the definition of "receipt" as including "the charge for any service taxable under this act". N.J.S.A. 54:32B-2(f), (d). He then asserts:

> "Thus the sales tax is imposed upon the receipts derived from sales including the receipts derived from the performance of a taxable service." (Rbo at 3).

Respondent's construction of the statute defies rational explanation. The statute observes the distinct meanings of *perform* and *render*, and expressly declares that whether or not services are performed within the State is irrelevant to whether or not they are subject to

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1. These cases are treated in the petition. Throughout these proceedings petitioner has invited the attention of respondent and of the courts below to the rules they declare and to their symmetry and consistency in the body of law based on *Berwind-White* and *Silas Mason*.

tax.[2] Performance of a service is only a part of the transaction of a sale or purchase; the transaction is completed by the rendering of the service to the purchaser for a consideration or an agreement therefor. The tax at issue is a tax "on the sales of certain services within the State", as the statute's title declares it to be, and it is laid on the purchaser for consumption. It is not a tax on the privilege of performing services within the state, laid upon petitioner.

Attempting to bring this case within the holding of *Fisher-Stevens, Inc. v. Director, Division of Taxation*, 121 N.J. Super. 513, 298 A.2d 77 (App. Div. 1972), certif. den. 62 N.J. 575, 303 A.2d 328 (1973), respondent says:

> "*** [petitioner] in this case performed the servicing and repairing functions upon which the tax has been assessed solely in New Jersey. No other state could tax those particular functions***." (Rbo at 5.)

But the court's holding in *Fisher-Stevens* turned on the findings that "[n]o other state could justifiably tax *the sale* of" the direct mailing services there at issue, and that

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2. Petitioner is a "vendor" subject to sales tax collection duties under the statutory definition of that term as

> "A person maintaining a place of business in the State and making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed by this act;" N.J.S.A. 54:32B-2(i)(1)(B)

"Property and services the use of which is subject to tax" is defined by the statute to include

> "all services rendered to a person within the State, whether or not such services are performed within the State, upon tangible personal property the use of which is subject to tax under section (6) or will become subject to tax when such property is received by or comes into possession or control of such person within the State." N.J.S.A. 54:32B-2(y)

Section (6) imposes the compensating use tax.

"[t]he direct mailers are not selling a product which is transported across state lines and *whose use can later be taxed****." *Id.* 121 N.J. Super. 513 at 522 (emphasis supplied.) In this case, quite to the contrary, repair services were rendered to the purchasers by delivery in other states and the *sales* of the repairs subjected to the New Jersey retail sales tax could be—and were—subjected to the use taxes of the states in which the repaired equipment was delivered and used.

Respondent's tailoring of the law has thus led him to a need to blind himself to the consequences of his actions. Having trimmed away and discarded from these interstate sales parts integral to them—delivery of possession and control of the repaired equipment to the purchasers in other states and use of it there—he asserts that the part of the fabric that remains—performance of the repairs by petitioner in New Jersey—is an intrastate activity which no other state can tax. Interstate sales being, however, interstate sales, they were seen as such by the purchasers and by the taxing authorities of the purchasers' states, who, respectively, paid and collected use taxes measured by the price paid for the repairs. Respondent sees only "receipts derived from the performance of a taxable service" in the hands of petitioner upon which, he says, the tax is imposed. (Rbo at 3.) Neither the purchaser, upon whom the economic and legal incidence of the tax falls, nor the taxable activity—consumption and use of the repaired equipment—are any longer visible to respondent, although the purpose of his tailoring of the law was to exact revenue from out-of-state purchasers.

The same blindness to the facts of this case and the principles of law applicable to them is evident in respondent's treatment of this Court's decision in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Respondent quotes (Rbo at 9) the following portion of the opinion in that case:

> "So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at 260.

Respondent then says:

> "Clearly, the holding in *Western Live Stock* is applicable to this case and completely undermines [petitioner's] contention that the sales tax imposition on the repairing services in some undisclosed manner burdens interstate commerce. No state other than New Jersey has the constitutional jurisdiction to impose an excise tax on the performance in New Jersey of the repairing services by [petitioner]." (Rbo at 10.)

The out-of-state purchaser, not petitioner, is the taxpayer in each of the sales at issue. The value contributed to the purchasers' equipment by the performance of repairs by petitioner could be—and was—taxed by the states in which the repaired equipment was delivered and used. The New Jersey retail sales tax imposed on the purchasers by respondent was one which in form and substance could be—and was—repeated by the market states. The identity in the form and substance of retail sales and compensating use taxes should be apparent to respondent from examination of the New Jersey statute he administers. If the manner in which imposition of New Jersey's retail sales tax on the out-of-state purchasers burdened interstate commerce is still undisclosed to respondent, it is because he has chosen not to look at the facts and the law which petitioner has sought since these proceedings began to bring to his attention.

3. In *Western Live Stock* this Court observed that:

> "All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent." 303 U.S. 250 at 260.

Respondent quotes the first two sentences of this portion of the opinion, but not the last, in support of his contention that the nexus required for jurisdiction to tax was present here. (Rbo at 8.) The privilege tax sustained in *Western Live Stock*, however, was laid upon the gross receipts of persons within the state engaged in specified businesses, including receipts of publishers of magazines from the sale of advertising space, but excluding receipts from sales of subscriptions to the magazine. *Id.* at pp. 252, 259. The retail sales taxes assessed against the purchasers in other states in this case, on the other hand, were in each case conditioned on an event—sale and delivery of repairs to equipment—which was itself interstate commerce. The taxable activities—consumption and use of the repaired equipment—were within the control and taxing power of the market states, where the equipment was used. The dangers which ensued from the imposition by New Jersey of a tax measured by gross receipts derived directly from interstate commerce were not merely present, they were unavoidable.

Benefits conferred on the taxpayers consisted of the protection and services provided to petitioner of which, according to respondent, the taxpayers—the out-of-state

purchasers—"were direct beneficiaries." (Rbo at 8.) By this reasoning anyone in another state doing business with respondent is brought within New Jersey's taxing power; surely out-of-state purchasers of the products manufactured by petitioner are beneficiaries of the services provided by the state to petitioner in every sense that out-of-state purchasers of repair services are beneficiaries. The latter are singled out by respondent's actions herein as the one class of taxpayers who must pay a tax in addition to the taxes paid by petitioner for the services provided by the state to petitioner. Purchasers within the state of repair services pay retail sales tax to the state for the privilege of using the repaired equipment over its useful life, during which the state provides protection and services directly to them.

Respondent contends that the tax assessed upon these interstate sales placed no more burden on them than the burden imposed on like intrastate sales

> "**** because the New Jersey Sales Tax was uniformly imposed at the 5% rate for the period in question upon all taxable receipts irrespective of whether the receipts related to interstate or intrastate sales."

This Court said with regard to a similar contention by a taxing authority:

> "It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only

to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position." *Nippert v. Richmond*, 327 U.S. 416 (1946) at 431.

4. Respondent places his principal reliance on *Evco v. Jones*, 409 U.S. 91 (1972) and *Western Live Stock*. In *Evco* this Court struck down the imposition of the New Mexico gross receipts tax on a New Mexico seller of reproducible originals of printed and graphic materials to the extent that the tax was measured by sales to purchasers out of the state, since the state court had found that the transactions were interstate sales of tangible personal property. The Court outlined rules concerning state taxation of sellers within the taxing state as to sales of services established by its previous decisions. As to the issues in the instant case this Court's decisions in *Western Live Stock* and *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939) are more directly pertinent than its decision in *Evco*. The rules laid down in *Gwin* (treated in the petition at pp. 27-28) and in *Western Live Stock* are, of course, consistent with the rules laid down in *Berwind-White* and *Silas Mason*. The law established by those four cases is controlling here. Imposition of retail sales tax on the out-of-state purchasers of repairs, under the law of those cases, violated the equal protection and due process clauses of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition the writ prayed for should be granted.

Respectfully submitted,

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